Cheah Tjeng Siong v Lim Sin Oo & Ors

HIGH COURT (PENANG) — BANKRUPTCY NO 29-787-89
EDGAR JOSEPH JR J
7 JANUARY 1991

Bankruptcy — Bankruptcy notice — Issuing of — Judgment creditors owners of land — Sale of land to judgment debtor — Failure to complete purchase — Specific performance against judgment debtor — Failure by judgment debtor to comply with order — Plaintiff creditor not in position to commence execution proceedings — Whether bankruptcy notice can be issued — Rules of the High Court 1980, O 42 r 6 & O 45 r 7(4)

The judgment creditors were owners of certain land and had contracted to sell it to the judgment debtor at a price of $999,999 but the latter failed to complete the contract. The judgment creditors issued a writ of summons for specific performance of the contract and a summons for summary judgment that the contract be specifically performed. The court had decreed specific performance and ordered, inter alia, that the judgment debtor pay the balance of the purchase price of $599,100. The judgment for specific performance did not fix the date for completion nor had a registrar's certificate been obtained fixing a time and place for completion. The judgment debtor failed to pay the balance of the purchase price, and the judgment creditors issued a bankruptcy notice which was duly served upon the judgment debtor who then made this application to set aside the bankruptcy notice. The ground given was that the judgment upon which it was founded was not a final judgment which finally determined the rights of the parties nor did it finally determine the matters in dispute between the parties, it being merely a judgment for specific performance of a contract for the sale of land. The question before the court was whether it was open to the judgment creditors to enforce the decree of specific performance by recourse to bankruptcy proceedings.

Held, allowing the application and setting aside the bankruptcy notice:

(1) It is clear law that if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution, but must first apply for a further order directing the defendant to complete. The application may be made by summons or motion.

(2) The learned judge was of the opinion that in the particular circumstances of the present case, as at the date of the issue of the bankruptcy notice, the judgment creditors were not in a position to commence execution proceedings, and it was not open to them to issue a bankruptcy notice. To entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice.

[Bahasa Malaysia summary

Pemiutang penghakiman adalah tuanpunya sebidang tanah yang tertentu dan mereka telah membuat kontrak untuk menjual tanah itu kepada penghutang penghakiman pada harga $999,999 tetapi penghutang penghakiman gagal menyelesaikan kontrak itu. Jadi pemiutang penghakiman mengeluarkan satu writ saman untuk perlaksanaan spesifik kontrak itu dan satu saman untuk penghakiman terus supaya kontrak itu dilaksanakan secara spesifik. Mahkamah telah memutuskan perlaksanaan spesifik dan mengarahkan, antara lain, bahawa penghutang penghakiman membayar baki harga pembelian sebanyak $599,100. Penghakiman perlaksanaan spesifik itu tidak menetapkan tarikh untuk penyelesaian; sijil pendaftar juga tidak diperolehi untuk menetapkan masa dan tempat penyelesaian. Penghutang penghakiman gagal membayar baki harga pembelian, dan pemiutang penghakiman mengeluarkan notis kebankrapan yang telah disampaikan kepada penghutang penghakiman yang seterusnya membuat permohonan ini untuk mengenepikan notis kebankrapan itu. Alasan yang diberi ialah penghakiman yang mengasaskan notis itu bukan satu penghakiman muktamad yang menentukan hak pihak-pihak tersebut secara muktamad. Ia juga tidak menentukan secara muktamad hal yang dipertikaikan oleh pihak-pihak itu, memandangkan yang ia cuma adalah penghakiman bagi perlaksanaan spesifik kontrak penjualan tanah itu. Soalan di hadapan mahkamah ialah sama ada terdapat jalan yang terbuka kepada pemiutang untuk melaksanakan arahan perlaksanaan spesifik melalui prosiding kebankrapan.

Diputuskan, meluluskan permohonan itu dan mengenepikan notis kebankrapan:

(1) Adalah undang-undang yang jelas bahawa jika seseorang defendan gagal mematuhi satu perintah untuk penyelesaian, plaintif tidak boleh maju terus ke perlaksanaan, tetapi mesti terlebih dahulu memohon untuk perintah lanjutan untuk mengarahkan defendan menyelesaikan kontrak itu. Permohonan itu boleh dibuat melalui saman atau usul.

(2) Mahkamah berpendapat bahawa dalam keadaan tertentu di dalam kes ini, pada tarikh pengeluaran notis kebankrapan itu, pemiutang penghakiman tidak berada dalam kedudukan untuk memulakan prosiding perlaksanaan, dan jalan tidak terbuka untuk mereka mengeluarkan notis kebankrapan itu. Untuk membolehkan seseorang pemiutang mengeluarkan notis kebankrapan, beliau mesti berada dalam kedudukan untuk melaksanakan penghakiman itu pada masa beliau mengeluarkan notis kebankrapan.]

Cases referred to

1 *Palmer* v *Lark* [1945] 1 Ch 182 (refd)
2 *Morgan* v *Brisco* (1886) 32 Ch D 192 (refd)
3 *In re Tuck* [1906] 1 Ch 692 (refd)
4 *Cotton* v *Heyl* [1930] 1 Ch 510 (refd)
5 *Capital & Suburban Properties Ltd* v *Swycher & Ors* [1976] 1 All ER 881 (refd)
6 *Sudagar Singh* v *Nazeer* [1978] 3 All ER 817 (refd)
7 *Johnson & Anor* v *Agnew* [1979] 1 All ER 883 (refd)
8 *Wee Chow Yong t/a Vienna Music Centre* v *Public Finance Bhd* [1989] 3 MLJ 508 (folld)

Legislation referred to

Rules of the High Court 1980 O 42 r 6, O 45 r 1, O 45 r 7(4), O 81

Ranjit Singh and subsequently *RR Sethu* (*R Rajasingam* with him) for the judgment debtor.

Karin Lim Ai Ching for the judgment creditors.

Cur Adv Vult

Edgar Joseph Jr J: This was an application by a judgment debtor to impugn a bankruptcy notice on the ground that the judgment upon which it was founded was not a final judgment which finally determined the rights of the parties nor did it finally determine the matters in dispute between the parties, it being merely a judgment for specific performance of a contract for the sale of land entered in favour of the vendors who are the

judgment creditors against the purchaser who is the judgment debtor.

The factual situation is simple and may be shortly stated. The judgment creditors were owners of certain land and had contracted to sell it to the judgment debtor at the price of $999,999 but the latter failed to complete the contract, so the judgment creditors caused to be issued a writ of summons for specific performance of the contract and also a summons for summary judgment under O 81 of the Rules of the High Court 1980 ('RHC'), that the contract be specifically performed. After hearing counsel on both sides, my brother Wan Adnan J had decreed specific performance and further ordered that upon payment of the balance of the purchase price of $599,100, the judgment creditors were to execute a conveyance of the land with vacant possession.

The judgment debtor having failed to pay the balance of the purchase price, the judgment creditors caused to be issued a bankruptcy notice dated 22 June 1989 which was duly served upon the judgment debtor. The judgment debtor then applied to set aside the bankruptcy notice.

More particularly, the argument before me revolved around the question whether it is open to the judgment creditors who, as vendors of land, had obtained a decree for specific performance of the contract for the sale of land against the judgment debtor, as purchaser, to enforce the same by recourse to bankruptcy proceedings.

Since reserving judgment, however, a new point of law — not raised by either counsel, and details of which appear hereafter — had occurred to me. That being so, I invited counsel to address me on it and they did so.

My own research into the authorities show that it is clear law that if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution (see *Palmer* v *Lark*[1] at p 184) but must first apply for a further order directing the defendant to complete (see *Morgan* v *Brisco*[2]). The application may be made by summons or motion. (See, for example, 37 *Court Forms* (2nd Ed) (1981 issue) 132, Form 95.)

In practice, a judgment for specific performance usually fixes a date for completion of the contract by payment of the purchase price against the delivery of the executed conveyance, or other instrument and all documents of title to which the purchaser is entitled. (See 37 *Court Forms* (2nd Ed) (1981 issue) 36 and the Procedural Steps Nos 56-59 at pp 49-50.) The time is commonly four days from service of the order (RHC O 42 r 6 and see *In re Tuck*[3]) though of course other periods of time may be specified. However, if this is omitted, the omission can always be cured by a subsequent order. (See *Cotton* v *Heyl*.[4]) I need hardly add that in order to enable execution to be enforced, the order must be served personally on the individual against whom execution is sought and must be endorsed with a penal notice; that is to say, if the defendant fails to obey the order within the time specified he is liable to the process of execution to compel him to obey it. (See RHC O 45 r 7(4).) In a vendor's action it is more common to enforce the order by one or more of the various forms of execution available for the enforcement of a money judgment. (See RHC O 45 r 1.) So, for example, in *Capital & Suburban Properties Ltd* v *Swycher & Ors*[5] Sir John Pennycuick said at p 888:

> But what is the position if the purchaser fails to comply with the decree? It is not in dispute that in these circumstances the vendor may forfeit the deposit: *Hall* v *Burnell* [1911-13] All ER 631; he may claim liquidated damages under an express provision in the contract (where available): *Griffiths* v *Vezey* [1906] 1 Ch 796; and he may levy execution in respect of the money payable by the purchaser under the decree: *Fry on Specific Performance* (6th Ed, 1921) p 547; *Williams on Vendor and Purchaser* (4th Ed, 1936) p 1064.

In *Sudagar Singh* v *Nazeer*,[6] Megarry VC said this at p 821:

> ....when an order for specific performance of a contract for the sale of land is made, the contract continues to exist and is not merged in the order. This I think sufficiently appears from *Austins of East Hams Ltd* v *Macey* [1941] Ch 338. ... Secondly, it also seems clear that once an order for specific performance has been made, there are adequate remedies available to either party if the other does not appear to be proceeding under the order with due dispatch. Thus an application may be made for a time and place for completion to be fixed, or for an order rescinding the contract, either forthwith if the other party is refusing to complete, or else in default of completion within a limited time. I need not set out all the possibilities in detail; they appear in Fry's *Specific Performance* (6th Ed, 1921) pp 546-553; and see *Capital and Suburban Properties Ltd* v *Swycher* [1976] 1 All ER 881 at p 888. By applying for an order for specific performance, and obtaining it, I think that the applicant has put it in the hands of the court how the contract is to be carried out. As the court has become seised of the matter, and has made an order, it seems to me that subject to anything that the parties may then agree, the working out, variation or cancellation of that order is essentially a matter for the court.

In *Johnson & Anor* v *Agnew*,[7] Lord Wilberforce (at p 890) referred to what Megarry VC said as 'undoubted law'.

In the present case, the judgment for specific performance does not fix the date for completion nor had a registrar's certificate been obtained fixing a time and place for completion. (For a form of such certificate adopted from Chancery Masters' Practice Forms see Form 32 reproduced in 37 *Court Forms* (2nd Ed) (1981 issue) 130, Form 94.) In my view, even if a registrar's certificate had been obtained, the vendors in this case

should have gone further and obtained a formal order fixing a time and place for completion, since a registrar's certificate is not an order and so is capable of being disobeyed. (See 37 *Court Forms* (2nd Ed) (1981 issue) 36.)

For the foregoing reasons, I am of the opinion that in the particular circumstances of the present case, as at the date of the issue of the bankruptcy notice, the judgment creditors were not in a position to commence execution proceedings, and it was not open to them to issue a bankruptcy notice. As I said in *Wee Chow Yong t/a Vienna Music Centre* v *Public Finance Bhd*[8] at p 511, '....it seems to me that a reading of the three judgments in that case makes it clear that the Court of Appeal held (as I have already said) that on the proper construction of the subsection concerned, to entitle a creditor to *issue* a bankruptcy notice he must be in a position to issue execution on his judgment *at the time when he issued his bankruptcy notice.*'

Accordingly, on this ground alone I would allow the application and set aside the bankruptcy notice with costs. In consequence, the bankruptcy petition is also set aside.

In the circumstances, the question whether, assuming the judgment creditors had obtained a supplemental order fixing the time and place for completion before issuing the bankruptcy notice, it was then open to them to enforce the judgment for specific performance by recourse to bankruptcy proceedings, does not arise and I express no opinion upon it.

Judgment debtor's application allowed.

Solicitors: *Rajasingam & Co; Presgrave & Mathews.*

Reported by *Eunice Lee*

Loo Swee Poo & Ors v Datuk Bandar & Ors

HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NO R8-25-3-89
EUSOFF CHIN J
24 SEPTEMBER 1990

Food and Drugs — Seizure of packaged/tinned tea dust by third and fourth respondents — Application for the release of the tea seized — Whether seizure illegal, contrary to the provisions of s 4(1)(f) and (g) of the Food Act 1983 — Whether analyst's certificate obtained.

The third respondent (S Manoharan, Jabatan Kesihatan Bandaraya) and the fourth respondent (Dr Zainol Ariffin, Jabatan Kesihatan Bandaraya) had seized packaged/tinned tea dust belonging to the applicants. The applicants' solicitors wrote to the respondents to release the tea seized. Since there was no reply from the respondents, the applicants filed this application for the release of the tea seized on the ground that the seizure was illegal, contrary to the provisions of s 4(1)(f) and (g) of the Food Act 1983 ('the Act'). The question for decision is whether the seizure was illegal.

Held, allowing the application:

(1) The analyst's certificate under s 20 of the Act shall be the utmost evidence of the fact stated because under the Act, samples of any food, the definition of which includes drinks, must be sent to the analyst, who is required to give his certificate of analysis within 90 days, or else there would be no basis to institute prosecution for any relevant offence against the Act.

(2) The failure of the respondents in producing the certificate and to base a belief on a 1984 analyst's certificate is too remote to justify the third and fourth respondents' exercising their statutory powers in seizing and sealing the applicants' tea five years later on 5 May 1989.

(3) Labelling on the tea packets, tin or packages to the effect that colouring had been added, is not evidence that it contains colouring substances. The allegation on the label must be regarded as hearsay and inadmissible against the defendant.

(4) To found a 'belief' on the result of an analysis done some five years earlier in order to justify an action of seizure under s 4(1)(f) or (g) of the Act which came into force only on 1 October 1985 is certainly not reasonable. Section 4(1)(f) of the Act says 'believe' not 'suspect'. There must be reasonable grounds to support the continued detention of the seized tea dust and the respondents must satisfy the court that the seized tea or tea dust contained colouring substances.

[Bahasa Malaysia summary

Responden ketiga (S Manoharan, Jabatan Kesihatan Bandaraya) dan responden keempat (Dr Zainal Ariffin, Jabatan Kesihatan Bandaraya) telah menahan serbuk teh yang ditin kepunyaan pemohon. Peguam pemohon menulis kepada responden meminta teh itu dilepaskan. Oleh kerana tidak ada jawapan daripada responden, pemohon memfailkan permohonan ini untuk pelepasan teh yang ditahan atas alasan penahanan itu tidak sah, berlawanan dengan peruntukan s 4(1)(f) dan (g) Akta Makanan 1983 ('Akta itu'). Soalan untuk keputusan ialah sama ada penahanan itu tidak sah.